No. 2647

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY,

Appellant,

vs.

ALASKA PACIFIC FISHERIES,

Appellee,

BRIEF FOR APPELLEE

C. H. HANFORD,
KERR & McCORD,
Proctors for Appellee.

Filed this.....day of October, 1915.

.....

Clerk.

By.....

Deputy Clerk.

LOWMAN & HANFORD CO., SEATTLE

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STATEMENT.

This is a suit *in rem,* against the steamship Jeannie, employed as a common carrier in interstate commerce, to recover damages for a maritime tort. The pleadings to be considered consist of the Libel, Amended Answer and Second Amended Libel, which supersedes the original and First Amended Libel and to which there is subjoined a reply to affirmative matter pleaded in the Amended Answer.

The case being a suit in admiralty brought in a United States District Court founded upon transactions in interstate commerce, the Libelant is not re-

quired to allege or prove a right to maintain it by virtue of compliance with the requirements of State statutes as to payment of annual fees or other prescribed conditions.

Norfolk v. W. R. Co., 136 U. S. 114; 10 Sup. Ct. 958;

Sioux Remedy Co. v. Cope, 235 U. S. 197; 59 L. Ed. Ad. 1914, p. 57;

Clyde Steamship Co. v. City Council, 76 Fed. Rep. 46;

The Fred E. Sander, 208 Fed. Rep. 724.

The Libelant is a corporation organized and existing under and by virtue of the laws of the State of Oregon. (Stipulation, Record p. 192.)

The Amended Answer admits that at the times of the transactions alleged in the Libel, the steamship Jeannie was a common carrier of freight between ports in the State of Washington and ports of Alaska; and that at the time of the commencement of this suit she was within the district and jurisdiction of the District Court in which it was commenced.

A bond for release of said steamship was given and now constitutes the *res,* in place of the vessel.

The Facts of the Case are as follows:

1. In the year 1912 the Libelant owned and operated salmon canneries at Chilcoot, at Yes Bay and at Cholmley in Alaska and owned the several consignments of canned salmon hereinafter referred to.

2. In the months of December, 1912, and Janu-

ary, 1913, the Jeannie made a voyage from Seattle to Alaska and return, carrying on her northbound trip a cargo of coal in bulk and other merchandise, which coal was discharged from the ship, partly at Juneau, before any cargo for the return trip was taken on board and the remainder thereof at Sitka and at Ketchikan after passing Chilcoot. (Testimony of Capt. Karbbe, pp. 243, 260-261-2, 270.)

3. While northbound and before any coal had been discharged the Jeannie was detained several hours in Wrangell Narrows, where she was anchored in shoal water and although, loaded as she was, the draught of said vessel was 20.6 feet, the ebbing of the tide left a depth of water surrounding her of only twelve feet and she sank into the muddy bottom approximately four feet; but with the return tide she floated and proceeded to Juneau; and from thence continued on her voyage. (Testimony of Capt. Karbbe, pp. 246-7, 260-266.)

4. After passing Chilcoot an attempt was made to take the Jeannie from Gypsum to Sulzer via the open ocean route, tempestuous weather was encountered and, being unable to make headway, that intended trip was abandoned and the ship proceeded to Sitka and from thence to Ketchikan. In the heavy weather referred to in this paragraph the ship's decks were washed by waves breaking over her, she rolled and her officers presumed that she may have been strained, but the only injury reported was the loosening of one plank of her floor on the bottom of her hold, which was found afloat with

bilge water swashing through the opening of the floor, and said plank was replaced. (Testimony of Karbbe, pp. 250-1-2-3; testimony of Gunther, pp. 349-350, 364-5.)

5. From Ketchikan the Jeannie went to Yes Bay and to Cholmley, returned to Ketchikan and from there, on the 3rd day of January, proceeded on her homeward voyage, arriving at Seattle on the 8th day of January, 1913, being delayed by very heavy weather, gales and snow storms, which were nearly continuous but caused no injury to the ship, unless by straining in a way to open the seams of her deck. (Testimony of Karbbe, pp. 254-5.)

6. The Jeannie is a wooden vessel, she leaked previous to and during said voyage but not to excess beyond the capacity of her pumps to prevent any considerable accumulation of water in her hold. (Testimony of Karbbe, pp. 245-254.)

7. On the routes traversed by the Jeannie on said voyage, gales and rough weather are frequent and to be expected in the winter season. (Testimony of Karbbe, pp. 288, 277.)

8. During said voyage the Jeannie was under a time charter and was operated by W. F. Swan acting as manager for the charterers.

9. There was no survey or inspection of the Jeannie, to ascertain her condition as to seaworthiness, by her owner, charterers or any person acting for either of them, between the time of her arrival at Seattle on her return from her last preceding voyage and her departure from Seattle on said voy-

age in December, 1912; nor at either of the ports in Alaska called at during said voyage. (Testimony of Karbbe, p. 271; testimony of Swan, p. 324; testimony of Dawson, pp. 311-12.)

10. Before starting on said voyage, the master of the Jeannie requested her owner to furnish new tarpaulins needed for hatch covers, but they were not furnished. (Testimony of Roberts, p. 112-113.)

11. On said voyage the Jeannie received and took on board from the Libelant's cannery at Chilcoot 10,747 cases of canned salmon, and from Libelant's cannery at Yes Bay 13,972 other cases of canned salmon, and from Libelant's cannery at Cholmley 4,737 other cases of canned salmon, in the aggregate 29,657 cases for transportation to Seattle.

12. All of said cases and the contents thereof when received and taken on board of the Jeannie were in perfect good order and condition for shipment. (Testimony of F. O. Burckhart, pp. 80-81-90; Heckman, pp. 102; C. A. Burckhart, pp. 152; Horner, pp. 201-2-3-4-5.)

13. On arrival of the Jeannie at Seattle terminating said voyage said cargo of salmon, as an entirety was in a damaged condition; many of the cases and the cans therein were soiled by coal dust which had sifted through the cargo and into the cases of the salmon and many of the cases and cans therein were wet by sea water and bilge water; more than 4,000 cases were actually damaged by coal dust or water or both and every one of the 29,657 cases had to be and were opened and repacked for the

reason that many of the cases which were dry and clean on the outside thereof contained cans which were damaged by coal dust and dampness. (Testimony of F. O. Burckhart, p. 83-84-85; C. A. Burckhart, p. 155; Heckman, pp. 104-5; Roberts, pp.....; Horner, pp. 198-9; Isted, pp. 119-120; West, p. 330; Gunther, p. 356.)

14. At the time of said voyage the owner of the Jeannie carried indemnity insurance against liabilities of the ship for damages to merchandise carried by her; and said charterer and an agent of the insurer were immediately after the termination of said voyage by arrival of the ship at Seatle informed of the damage to said canned salmon while in transit, and both had actual knowledge thereof and the nature and extent of said damage and of the action taken to overhaul said canned salmon and restore the same to marketable condition. (Testimony of West, pp. 326-336; Dawson, pp. 314-315-318.)

15. When the Jeannie's hatches were uncovered it was apparent that sea water in large quantities had been admitted into the interior of the ship where said cargo was stowed, through the hatches and through the ship's deck, and said space was wet and dirty and the tarpaulins used for hatch covers were old, worn, perforated and rotten. (Testimony of C. A. Burckhart, pp. 154; Roberts, p. 117; F. O. Burckhart, p. 85.)

16. With business like promptness and approval of the libelant, said charterer and the indemnity in-

surer of the Jeannie's owner, a competent contractor for such work commenced and carried through to completion, the necessary work of overhauling, reconditioning, relabeling, and repacking said canned salmon; and did restore the same to marketable condition; which work was finished on the 20th day of March, 1913, at an expense of $4,283.06, which amount was the actual and reasonable charge of said contractor. (Testimnoy of C. A. Burckhart, pp. 156-7, 396; Dawson, pp. 316; West, pp. 329; Horner, 196-7-200-201-202.) Libelant's Exhibit A.

17. The charterer and the insurer both refused to pay said contractor's bill; and in order to obtain possession of said canned salmon the libelant was obliged to pay it, and did pay it, on the 8th day of April, 1913. Testimony of C. A. Burckhart, p. 175; Horner, p. 202.)

18. The libelant paid in full the freight charges for transportation of said canned salmon from the canneries at Seattle. (Testimony of C. A. Burckhart, p. 153.)

19. The libelant incurred expense and paid for storage of said canned salmon during the time required for reconditioning the same $778.47 and for insurance during the same time $150.54. (Testimony of C. A. Burckhart, p. 162.)

20. The value of said 29,657 cases of canned salmon on the 10th day of January, 1913, at the then market price at Seattle, if the same had been in the same good condition as when taken on board the

Jeannie, would have been $85,630.40. (Testimony of C. A. Burckhart, p. 159; Small, pp. 132-3-4.)

21. During the time required for reconditioning said salmon there was a decline in the market price so that on the 20th day of March, 1913, the value thereof was $77,695.00. The difference in market price values between the two dates being $7,935.00. (Testimony of C. A. Burckhart, p. 160; Small, p. 134.)

22. The only contract for the transportation of said canned salmon is implied from a verbal request by the libelant to the Jeannie's owner, *pro hac vice,* that is the charterer to have the ship bring said merchandise from the canneries to Seattle, and the undertaking of that service by receiving said merchandise on board of the ship for carriage, and the payment of freight. (Testimony of Swan, pp. 320-321.)

23. No compensation has been rendered to the libelant for the loss sustained by the damage to said merchandise while in transit on board of the Jeannie.

24. On the 7th day of April, 1913, the Libelant was about to commence a suit *in rem,* against the Jeannie to recover damages for the loss aforesaid; and, on that day, in consideration of forbearance an agreement in writing was executed by the Claimant and delivered to and accepted by the Libelant in words and figures as follows: to-wit:

AGREEMENT

THIS AGREEMENT, made this 7th day of April, 1913, in the City of Seattle, between the ALASKA COAST CO. for themselves and on behalf of W. F. Swan, party of the first part, and ALASKA PACIFIC FISHERIES, party of the second part, WITNESSETH:

THAT, WHEREAS, the Steamer "JEANNIE," owned by the Alaska Coast Co. and under charter to W. F. Swan, party of the first part, did on the 21st day of December, sail from the port of Chilkoot, Alaska, bound on a voyage to Seattle, Washington, via various ports of call, and on the voyage South took on a cargo of salmon at the various ports of call, and on January 8, 1913, arrived at Seattle, and on subsequent dates it was found that the cargo of salmon had been more or less damaged on the voyage South, and

WHEREAS, It is the desire of the party of the first part, and party of the second part, owner of the salmon, to this agreement, to avoid all unnecessary expenses in connection with any litigation and determination of liability for the loss of or damage to said salmon;

NOW, THEREFORE, In consideration of the sum of One dollar ($1.00) paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, it is hereby agreed by the party of the first part, that in consideration of the sum so above paid and of the premises here-

inbefore and hereinafter mentioned that the party of the second part shall at this time refrain in taking any legal proceedings in the matter of the protection of their claim by filing a libel against the Steam "JEANIE," the said party of the first part hereby undertakes and agrees that it will stand in the place of and accept services on behalf of the Steamer "JEANIE" in connection with any claim against said steamer, and will at any time that the party of the second part may desire to commence litigation appear in Court on behalf of said Steamer, and will give security for the payment of any claim which may rightfully be due against said steamer, notwithstanding the fact that the steamer may not at the time of the beginning of the suit be within the jurisdiction of the Court, and

IT IS HEREBY FURTHER AGREED By the party of the first part, that it is the intention and purpose of this agreement to place the party of the second part in the same position as though the Steamer "JEANIE" had been libeled and suit begun upon the date of the signing of this agreement.

W. F. Swan
For First Party

ALASKA COAST CO.
C. W. Wiley, Manager.

ALASKA PACIFIC FISHERIES
By C. A. Burckhart, President.

B. H. Claghorn
For Second Party

25. In compliance with the provisions of said agreement and in expectation that a reasonable settlement of its claims for damages would be effected

without litigation the Libelant did forbear to bring a suit to enforce said claim, until the date of filing its original libel herein, to-wit: September 29, 1913. (Testimony of C. A. Burckhart, p. 396.)

The written decision of the District Court evinces painstaking study of the evidence and correct conclusions; and in accordance therewith a decree was rendered awarding damages to the Libelant in the sum of $12,796.26 with interest and costs.

APPELLANT'S ASSIGNMENT OF ERRORS.

Assignment numbered I controverts the Court's conclusion that the Jeannie was unseaworthy.

The Court based that conclusion upon a rule of law stated in the following quotation from a decision of the Supreme Court of the United States:

> "As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that the vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect."

The evidentiary facts sustaining the conclusion are as follows:

On her north bound trip from Seattle to Alaska the Jeannie carried a cargo of coal in bulk. This is proved by the testimony of Capt. Karbbe and Gunther, witnesses for the appellant. (Record, pp. ....)

The canned salmon was packed in first-class condition for market. (Testimony of F. O. Burck-

hart, Heckman, C. A. Burckhart, and Horner. Record, pp. 80-81-90-102, 152-20-5.)

The cases were dry and clean when taken into the ship. (Deposition of Banbury. Record, p. 434.)

The tarpaulins used for covering the hatches were old, perforated and rotten; before commencing the voyage Capt. Karbbe asked for new tarpaulins and they were not furnished. (Testimony of F. O. Burckhart, C. A. Burckhart and Roberts. Record, pp. 85, 117, 154.)

One of the floor planks in the bottom of the ship's hold became displaced, making an opening in the floor in near proximity to where part of the cargo of salmon was stowed, through which bilge water swashed upon said cargo. The displacement of said plank is not accounted for except by a supposition of a witness that it was loosened and floated by action of the bilge water in the ship. (Testimony of Gunther. Record, pp. 349-350-364-5.)

The same witness, who was an officer of the ship, testified that the only explanation he could give for the wetting of the cargo in different parts of the ship was that when the ship was rolling in heavy seas bilge water swashed through cracks or seams in the skin of the ship. (Record, p. 354-5-6-7, 366-7.)

When the salmon cargo was discharged at Seattle, more than four thousand cases and the cans therein were found to be damaged by being wet with sea-water and bilge water and soiled with coal dust which had sifted through the cargo spaces and into the cases. (Testimony of F. O. Burckhart, C. A.

Burckhart, Isted, Horner, and West. Record, pp. 83-5, 104-5, 119-120, 155, 330, 356.)

Many of the damaged cases were stowed in the space directly beneath one of the hatches. (Same testimony last cited.)

The foregoing facts and circumstances are established by convincing evidence and they lead with absolute certainty to the conclusion that at the time of the voyage in question the Jeannie was not staunch nor tight and that her cargo spaces were not cleansed sufficiently to make her fit as a carrier of foodstuff. Therefore by the rule above quoted she was not seaworthy.

Assignment numbered II asserts error in finding that there was an oral understanding or agreement for the transportation of the said cargo.

The facts are that at the time of said voyage the Jeannie was being operated by charterers, and W. F. Swan was her manager. (Testimony of Swan and Dawson. Record, pp. 318-319.)

C. A. Burckhart was president and manager of the Libelant Corporation. (Record, p. 152.)

While the Jeannie was in Alaska Burckhart, at Seattle, verbally requested Swan to have the Jeannie bring the salmon from the canneries to Seattle. (Testimony of Swan. Record, pp. 320-321.)

Swan telegraphed instructions to the Captain of the Jeannie to bring the cargo to Seattle and the steamer did bring the cargo pursuant to said telegraphic instruction. (Testimony Karbbe. Record, pp. 248-296.)

Assignment numbered III tapers off at the end to a mere criticism of the choice of words used by Judge Neterer to express the idea that a watchman has no implied authority to make contracts binding upon his employer. Enough said.

Assignment numbered IV asserts error in rejecting Appellant's contention that the ship was released from liability for damages in this case by virtue of certain clauses in the documents pleaded in the amended answer as bills of lading and by reason of failure of Libelant to comply with the terms and conditions of said clauses relative to filing its claim and commencing suit within a specified limit of time.

The preposterous idea of basing a defense on said documents was not hatched until after the filing of the first answer in this case.

Section 4, of the Harter Act prescribes that it shall be the duty of the owner, master or agent of any vessel to issue a bill of lading for merchandise received for transportation.

Said so-called bills of lading were not issued by either the owner, master or an agent of the Jeanie, but were made up and signed by Banbury acting in the capacity of purser; and he had no authority to make contracts for the ship, her owner, master, or her charterers. (Deposition of Banbury. Record, p. 434.)

Banbury admitted having told F. O. Burckhart that he was uncertain whether he delivered copies to Swan for the Libelant or sent them by mail. If

otherwise delivered they were handed to watchmen at the several canneries in Alaska.

They were never assented to by any officer of the libelant corporation or consignee of the cargo, nor seen by either of them, until copies appeared annexed to the amended answer. (Testimony of F. O. Burckhart, C. A. Burckhart, and Stipulation. Record, pp. 374-375, 393-394, 399.)

By an agreement in writing executed by the Appellant and Libelant subsequent to the overhauling and reconditioning of the cargo, Libelant's claim for damages was recognized and the right to maintain a suit, *in rem,* against the Jeannie was preserved and time for commencing said suit was extended indefinitely. (Testimony of C. A. Burckhart, and Libelant's Exhibit B. Record, pp. 395-396.)

Assignment numbered V asserts error in denying exemption of the Jeannie from liability by virtue of the Harter Act.

Any exemption from a common carrier's liability for damage to cargo under that act is dependent upon a condition precedent that the owner shall exercise of due diligence to make the carrying vessel in all respects seaworthy and properly manned, equipped and supplied at the time of dispatching her on a voyage; and when due diligence has been exercised the exemption from liability is restricted to losses or damage resulting from specified causes, not including negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery

of merchandise committed to the ship or its owner's, master's or agent's charge.

Instead of exercising due diligence to make the Jeannie seaworthy at the time of her departure from Seattle, or at any port of call during the progress of the voyage there was not even a survey, or inspection, to ascertain her condition; and damage to the Libelant's goods is a direct result of failure to supply equipment, to-wit, new tarpaulins, necessary for hatch covers which her master requested. The evidence proving these facts has been cited as affecting the first assignment.

The nature of the damage to the cargo proves conclusively negligence in failure to properly stow and dunnage the cargo and protect it from bilge water coming through cracks and openings in the skin and floor of the ship and from coal dust.

This is an action founded upon a tort and the gravamen of the case is in the personal negligence of the Jeannie's master. His own testimony proves that he consciously neglected his duty with respect to the handling and care of the cargo; when it was his business to supervise the loading instead of seeing whether or not the interior of the ship was clean and in fit condition for a cargo of foodstuff or giving any attention to the manner of stowing and dunnaging the cargo, he went to bed; and he was so absolutely careless concerning the cargo that he knew nothing whatever of any damage until after the ship had been discharged, although the damage was so well known to others before the ship left

Ketchikan that the ship's manager received news of the fact at Seattle by telegraph at the very time when the ship was encountering the most violent storms to which she was exposed during the entire homeward voyage. (Testimony of Karbbe. Record, pp. 255-258, 262, 279; Roberts, p. 112. Deposition of Cochran, p. 413.)

Assignments numbered VI, X and XI are general and merely challenge the merits of the Libelant's whole case.

Assignment numbered VII asserts error in allowing, as part of the damages awarded, the expense of overhauling and reconditioning the cargo.

By incurring that expense a much heavier loss, approximating a total sacrifice of $85,000 worth of merchandise, was averted, for the cargo as an entirety in the condition in which it came out of the ship was unmerchantable. (Testimony of Isted, and C. A. Burckhart. Record, pp. 121-157.)

About one-half of the damaged cases were set apart on the dock when they came out of the ship; other cases, which were damaged or contained soiled cans, were mingled promiscuously throughout the entire mass so that it was necessary to open and repack every case. All of the work done was necessary to restore the goods to marketable condition and the amount charged and paid therefor was reasonable. (Testimony of C. A. Burckhart, Isted, Horner, and West. Record, pp. 158, 121, 197-8-9, 170, 223-4, 229.)

Assignments numbered VIII and IX assail the

decree for awarding damages according to the established legal rule for measuring damages for detention of merchandise.

During the seventy days while the goods were in the possession of the contractor who cleaned and scoured and relabeled and repacked the same and until his bill for doing that work was paid, the goods could not have been sold for immediate delivery. (Testimony of C. A. Burckhart. Record, p. 175.)

In practice sales of canned salmon for future delivery are made after the close of the canning season until the end of December, but after January the trade requires immediate delivery when a purchase is made except in rare instances. (Testimony of Small. Record pp. 149-150.)

The Kelly-Clarke Co. is a selling agency having the marketing of Libelant's goods and the products of other canneries; their method of filling orders, unless the products of a specified cannery is called for, is to pro rate among all their clients in proportions according to the quantity each may have available at the time when delivery is required, e. g., in filling an order for 10,000 cases when Client A has on hand 50,000 cases, Clients B and C each have 20,000 cases, and Client D 10,000 cases, one-tenth of the stock of each would be sold. (Testimony of Small. Record, pp. 139-140.)

There is always risk of loss in transit from the cannery to the trade center and for that reason, in order to get the benefit of opportunities for quick sales it is necessary to have the goods in stock

where immediate delivery can be made to purchasers; just as in all lines of trade the merchant who has goods to sell has an advantage over competitors who must get goods before they can fill an order.

By natural law, ready supply attracts purchasers, as demand stimulates production. That is the obvious reason why the Libelant, instead of waiting till March to move the goods from its canneries where there would have been no storage charges, caused the Jeannie to bring a cargo in December and thereby incurred expense for storage in a Seattle warehouse. (Testimony of C. A. Burckhart. Record, p. 405.)

Between January 10, when Libelant's goods should have been on sale, and March 21, when the contractor was ready to deliver the same in restored condition, the market value declined and thereby Libelant suffered an actual loss in depreciated value of its goods to the amount awarded as damages for that cause. (Testimony of Small and C. A. Burckhart. Record, pp. 133-134, 159-160.)

Judge Neterer's opinion in this case is sound in reason and amply supported by the authorities therein cited. We submit that the assignments of error are each and all groundless.

This Court may not go further in consideration of the case than is necessary to dispose of the assignments of error; nevertheless in theory an appeal in an Admiralty case entitles the parties to a trial *de novo,* and on this theory we will now make

our argument, based on the facts hereinbefore stated.

ON THE MERITS.

The case for the Libelant rests upon the following propositions of law, supported by authorities:

I.

Although the relation of the parties became established by a contract, the cause of action is not a breach of the contract *by mere non-performance without injury to the goods,* but the cause of action is for an injury inflicted by wrongful conduct in violation of the duty which the law imposes upon a common carrier.

The Escanaba, 96 Fed. Rep. 252.
The Quickstep, 9 Wall. 665.
Atlantic & Pac. R. Co. v. Laird, 164 U. S. 393.
The John G. Stevens, 170 U. S. 124; 18 Sup. Ct. 544.
Central Trust Co. v. East Tenn. V. & G. R. Co., 70 Fed. Rep. 764-7.
California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. Rep. 5.

II.

When not otherwise provided by a special contract, a common carrier of merchandise for hire, by sea, is bound to the absolute duty of furnishing a seaworthy vessel. This implies that the ship shall be at the time of her departure from any port, with cargo on board, staunch, water tight, well provi-

sioned, manned by competent officers and crew, well equipped and properly provisioned for the particular voyage to be undertaken to the extent of being able to ride out successfully all such storms and rough seas as are expected to be encountered between the ports of loading and discharge, and to have her cargo well stowed, dunnaged and protected.

III.

In every contract of affreightment there is an implied warrant of seaworthiness of the carrying vessel and an obligation of the carrier to safeguard, and transport the cargo to its destination without unreasonable delay and make right delivery there, promptly.

The Caledonia, 43 Fed. Rep. 681, was a suit by a shipper for damages for delay in transportation of cattle, caused by the breaking of the carrying steamer's shaft; there was a preliminary agreement for the transportation service, and subsequent thereto a Bill of Lading containing exemption clauses was signed and accepted by the Libelant; there was a loss by decline in the market value of the cattle during the time of delay in reaching destination. In his decision Mr. Justice Gray said:

> "When the parties have made such a contract, the ship owner cannot, without the shipper's consent, vary its terms by inserting new provisions in a bill of lading, * * * In the case at bar, the unseaworthiness of the vessel consisted in the unfitness of her shaft when she left

port, * * * The exception of 'steam boilers and machinery, or defects therein,' inserted in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of the voyage, must, by elementary rules of construction, and according to the great weight of authority, be held to be equally limited in its scope, and not to affect the warranty of seaworthiness at the time of leaving port upon her voyage. * * * A common carrier, receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the same place afterwards, and when their market value is less, is responsible to the owner of the goods for such differences in value. * * * The same general rule has been often recognized as applying to carriers by sea in this circuit as well as in the second circuit."

In accordance with the opinion a decree for damages was awarded, and on appeal affirmed in 157 U. S. 124; 15 Sup. Ct. 537, 39 L. Ed. 644. In the opinion of the Supreme Court, it is said that:

"In our opinion the ship owner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and this being so, that undertaking is not discharged be-

cause the want of fitness is the result of latent defects."

The Lillie Hamilton, 18 Fed. Rep. 327.

In this case a schooner of the type known as a canal vessel sank in the Welland Canal, after bumping on a rock and the suit was for resulting damage to her cargo of corn. The Court held that the vessel was unseaworthy and the opinion contains the following quotation:

From 3 Kent's Commentaries 205:

"By the contract the owner is bound to see that the ship is seaworthy, which means that she must be tight, staunch, and strong, well furnished, manned, victualed, and in all respects equipped in the usual manner for the merchant service in such a trade. The ship must be fit and competent for the sort of cargo and the particular service for which she is engaged. If there should be a latent defect in the vessel unknown to the owner, and undiscoverable upon examination, yet the better opinion is that the owner must answer for the damage occasioned by the defect. It is an implied warranty in the contract that the ship be sufficient for the voyage, and the owner, like a common carrier, is an insurer against everything but the excepted peril."

From the opinion of the Supreme Court in the case of *Dupont de Nemours v. Vance,* 19 How. 162:

"To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so

tight, staunch, and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo."

And this from the Supreme Court decision in *Work v. Leathers,* 97 U. S. 379:

"Where the owner of a vessel charters her, or offers her for trade, he is bound to see that she is seaworthy and suitable for the service in which she is to be employed, and if there be defects, known or not known, he is not excused."

In the opinion of the Supreme Court in *The Silvia,* 171 U. S. 464, Mr. Justice Gray said:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the carge which she has undertaken to transport."

In the *Southwark,* 191 U. S. 9, Mr. Justice Day said:

"As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that the vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect."

The Lizzie W. Virden, 8 Fed. Rep. 624; and 11 Fed. Rep. 903.

This suit was for damage to a cargo of almonds carried in a vessel which had carried petroleum on her preceding voyage, and the flavor and odor of petroleum was imparted to the almonds. The Court

held that the damage did not arise from a peril of the sea; the contract was to provide a vessel fit to carry such a cargo as was actually carried, and the vessel provided was unfit for the purpose.

The Hudson, 122 Fed. Rep. 96.

In this case the Court awarded damages for bad odor from part of a cargo of tanned skins affecting other cargo of tea in the same vessel. It became necessary during the voyage, owing to a threatened storm, to remove ventilators and plug openings for twenty hours, and in defending the ship it was claimed that the damage occurred at that time and was from a danger of navigation, within exceptions of the bills of lading and section 3 of the Harter Act. The Court held that the proximate cause of the damage was negligent stowage, for which the ship was not exempted from liability.

The Florida, 69 Federal 159.

This is a parallel case to the one in hand. The ship was held to be liable for damage to a consignment of filberts by coal dust.

The Mississippi, 113 Fed. Rep. 985; and 120 Fed. Rep. 1020.

In this case the ship was held liable for damage to furs and skins by leakage from drums containing glycerine, due to negligence in stowage, notwithstanding stipulations in the Bill of Lading exempting the ship from liability for damage to cargo protected by insurance; and the Harter Act was held to be not applicable. On the voyage the ship en-

countered great severity of weather and on arrival it was found that a number of the drums were chafed through and empty, and the dunnage and chocks were broken up in small pieces.

Corsar v. Spreckels, 141 Fed. Rep. 260.

This is another case of unseaworthiness, due to bad stowage. A cargo of cement was not properly distributed to give the ship the greatest ease, an excessive proportion being stowed in the lower hold. In the vicinity of Cape Horn, where the weather was rought the rolling of the ship strained her, so that her seams opened and leakage damaged the cargo; extreme bad weather compelled abandonment of the attempt to round Cape Horn and the voyage to San Francisco was completed via the Cape of Good Hope and Australia; and part of the cargo had to be shifted by moving some of the cement further aft and bringing some of it from the lower hold up to the 'tween deck. The Circuit Court of Appeals for the Ninth Circuit held, upon the ground that the cargo was insufficiently stowed for the voyage undertaken, the Libelant to be entitled to recover the full amount of the loss and damage sustained. It was decided so by a majority of the Judges in opposition to a dissenting opinion by Judge Gilbert, saying:

> "But the evidence is convincing that the weather encountered off the Horn was unusual. For a period of about 50 days there was unusual gales. A large portion of that time the ship lay to the wind."

The decision by a majority of the Court has been strengthened by a citation of it in a later decision by the same Court, in which Judge Gilbert concurred.

See:

Rainey v. New York & P. S. S. Co., 216 Fed. Rep. 453.

In the case of *Nine Hundred and Twenty-eight Barrels of Salt,* Fed. Cas. No. 10,272, on a voyage from Oswego to Chicago a schooner encountered a heavy gale of wind on Lake Huron and her rudder post was split so that she could not be steered by her rudder and an expense was incured for towage, which the Court held to be not a proper subject for general average. This was because the vessel was deemed to be unseaworthy in not being provided with a rudder of sufficient strength to meet the hazards of ordinary sea perils. Therefore the cargo was not liable to contribute to the expense incurred for towage.

In the case of *The C. W. Elphicke,* 122 Fed. Rep. 439, the vessel was held liable for damage to the cargo by reason of her unseaworthiness in failure to provide tarpaulins and hatch covers sufficient to prevent leakage when her decks were flooded in heavy weather, and it was held that a heavy gale on Lake Erie was to have been anticipated in the season of the year when the voyage was undertaken, and that to make the vessel seaworthy she should have been provided at the commencement of her voyage with sufficient hatch covers to prevent leakage.

IV.

For the due observance of the carrier's obligations with respect to merchandise received for transportation in a ship, the cargo owner has a maritime lien upon the ship, enforceable by a suit *in rem* in a court having admiralty jurisdiction.

> "Shippers have a lien by the maritime law upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fullfilment of the contract of the carrier, that he will safely keep, duly transport, and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment." *The Belfast,* 7 Wall. 642.
>
> "The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes and sea laws." *Dupont de Nemours v. Vance,* 19 How. 168.

Other authorities are very numerous among the admiralty decisions of the Federal Court.

V.

Proof that merchandise in good condition was received for transportation in a ship and when delivered at destination was in a damaged condition,

makes a *prima facie* case, imposing liability and a maritime lien upon the ship for damages.

In the case of *The Queen,* 78 Fed. Rep., on page 164, the Court said:

> "The allegation of the libel is that the merchandise was returned to the port of San Francisco in a greatly damaged condition by reason of having been wet with sea water during the said voyage, which, through the negligence of said steamship company and its officers and servants, gained access to the interior of the ship, where said merchandise was stowed. The burden of proving this allegation was upon the libelants; but, it being established that the merchandise had been returned to the port of shipment in a greatly damaged condition by reason of having been wet by sea water, a legal presumption of negligence arose which was attributed to the carrier because of this circumstance, and upon this presumption the libelants rested their case. But this legal presumption of negligence now placed upon the carrier was based upon a presumption of fact, that the vessel having become unfit to prosecute her voyage without being visibly exposed to any extraordinary perils or dangers of the sea, was in an unseaworthy condition when the voyage began. * * * This presumption of fact was met by proof from the claimant * * * (page 165-6). In the present case, the claimant has introduced testimony tending to establish the seaworthy condi-

tion of the vessel when she set out on her voyage, and this testimony has not been contradicted. Now, if the only presumption of negligence arising out of the damaged condition of the merchandise was that the voyage had been commenced with a vessel in an unseaworthy condition, the Court would be compelled to hold that the claimant had sufficiently answered the *prima facie* case made out by the libelants; but this does not appear to be the full scope of the presumption of negligence attributable to the carrier under this aspect of the case. Underlying the contract is an implied warranty, on the part of the carrier, to use due care and skill in navigating the vessel and in carrying goods, and it may be that, through some carelessness or negligence on the part of the carrier during the voyage, goods laden on board the vessel may suffer damage. * * * (page 170). The contention of claimant that the libelants, having alleged negligence, must prove it affirmatively, and that they cannot rely merely upon the *prima facie* presumption of negligence which the law raises upon proof of the return of the goods in a damaged state, is not tenable; for, if this were so, it would do away entirely with the *prima facie* presumption of negligence against the carrier."

A decree awarding damages to the libelants was affirmed by the Circuit Court of Appeals for the Ninth Circuit, 94 Fed. Rep. 180; but was re-

versed by the Supreme Court, because of long delay without excuse in commencing the suit; the carrier being protected by a stipulation in the bill of lading limiting the time within which the suit should have been commenced. 180 U. S. 49.

In *The Rappahanock,* 184 Fed. Rep. 291, it was held, by the Circuit Court of Appeals for the Second Circuit, that the burden rests upon a carrier, who, having agreed to deliver in good condition, "the dangers of navigation excepted," delivers cargo water-damaged, to show that the damage was caused by a danger of navigation; and proof that rough weather was encountered on the voyage, but not worse than was to be expected at the season, and that the damage was from leaking of a main feed pipe running through the cargo space was not sufficient to sustain the burden of proof resting upon the carrier to show that the damage resulted from a danger of navigation rather than from a defect in the pipe which rendered the vessel unseaworthy at the beginning of the voyage.

When a question arises at the end of a voyage as to the condition of the contents of casks, bales or cases when received by the ship the rule is that the burden is on the shipper to show by evidence that such contents were in good condition when so received. To this rule there appears to be attached this qualification: If the external covering of the goods is so damaged when they are delivered as to account for the injury to the contents, then such

evidence may be dispensed with. *The Solveig,* 217 Fed. Rep. 807.

In the case of *The Giulia,* 218 Fed. Rep. 744, a cargo of hemp was damaged by fresh water running out of a pipe in consequence of displacement of a plug. The master of the ship testified that, very bad weather was encountered in the month of December, that his ship was rolling badly and the seas coming on deck, that the feed pipe to a condenser broke, as did one of the valves in one of the boilers, that he was compelled to stop and put out a sea anchor and that the gale was so strong that the pipe rope to the sea anchor broke, and that on arrival in port he made a regular protest. The statements in the protest were to the effect that from December 18th to the 26th there was a strong northerly gale, the sea was high and rough, the ship rolling and pitching with heavy seas breaking over her decks, on December 24th furious storms, with high tempestuous seas, ship rolling fearfully, and decks flooded; on December 25th heavy seas, ship rolling heavily; on the 26th sea rough, and ship plunging fearfully, and taking seas all over.

The opinion of the Court states:

> "It is admitted that the bales of hemp were received by the carrier in good condition and delivered in bad condition. That being so, there certainly is no question but that the carrier, in seeking to be relieved from liability for damages under the exceptions of perils from the sea, was bound to prove that the injuries were the

result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence. * * * Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistable force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence. * * * We are not convinced that the cargo ever shifted, or that, if it did shift, that it displaced the plug running to the fresh water tank, the water from which in our opinion damaged this cargo."

On that conclusion a decree of the District Court in favor of the libelant for damages was affirmed.

VI.

Exemption of a ship from liability for damages to her cargo in transit must be based upon facts essential to a legal defense, alleged and proved affirmatively by the respondent.

> *The Patria,* 125 Fed. Rep. 425, 132 Fed. Rep. 971; *Wright v. W. R. Grace & Co.,* 203 Fed. Rep. 360.

These two cases fit each other and together they make a parallel to the case at bar; the first was a case of damage by coal dust and the second was for damage by sea water admitted into the interior of a vessel through her hatches. The sense of the deci-

sions of all the Judges who participated therein, is in the syllabus on page 425 of volume 125:

> "Where the evidence shows that a carrier received goods on board in good condition, and delivered them damaged, it has the burden of proof to show that the damage was due to a risk excepted in the bill of lading, and, in the absence of satisfactory proof that such was the cause, it must be held liable for the loss, although the cause of the damage does not plainly appear."

Ship owners do not intentionally expose lives and valuable property to the dangers of the deep in unseaworthy craft, nevertheless, unseaworthiness is a cause of so much litigation that courts are all Missourians, they require seaworthiness to be shown.

> In the first place there can be no presumption of seaworthiness in such a case as this. *The Wilderoft,* 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. It must be affirmatively proved by the ship owner." Per Holt Judge, in *The River Meander,* 209 Fed. Rep. 937.

The Folmina, 212 U. S. 363.

This case was sent to the Supreme Court for its answer to a certified question as follows:

> "Whether damage to the cargo of an apparently seaworthy ship, through unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew

of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from the act of God, * * * loss or damage from * * all and every the dangers and accidents from the seas, rivers, and canals and of navigation of whatever nature or kind."

In its opinion the Court said: The answer to be given

"will be fixed by determining upon whom rests the burden of proof to show the cause of the damage, when goods which have been received by a carrier in good order are by him delivered in a damaged condition. * * * It was long since settled in *Clark v. Barnwell,* 12 How. 272, that where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them at the termination of the voyage in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of the damages has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible. But as illustrated by the case of the *G. R. Booth,* 171 U. S. 450, 43 L. Ed. 234, 19 Sup. Ct. Rep. 9, proof merely of damage to cargo by sea water does not necessarily tend to establish that such damage to cargo was caused by a peril or danger of the seas."

Accordingly, "No," was the answer given to the certified question.

The Anna, 223 Fed. Rep. 558.

This is a recent case, in which the District Court for the Eastern District of Pennsylvania held a long voyage in tempestuous weather to be insufficient to relieve the ship from liability for damage to her cargo by seawater.

VII.

The implied warranty of seaworthy condition of a ship at the commencement of a voyage is not abrogated by the Harter Act.

VIII.

Due diligence upon the part of the ship-owner, to see that the carrying ship is actually seaworthy at the time of commencing a voyage, is a condition essential to any valid claim of exemption of the ship from liability for damages to her cargo in transit, under the provisions of the Harter Act.

The first four sections of the Harter Act are as follows:

> Be it enacted &c., That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability for loss or damage

arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agents, or charterers, shall become or be held responsible for

damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. Act of Feb. 13, 1903, 27 U. S. Stat. 445; 3 U. S.

Comp. Stat. 2946; Pierce's Fed. Code, Secs. 2133-6; 4 S. F. A. 854.

The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, is the leading case holding that the law of implied warranty of seaworthiness at the commencement of a voyage has not been changed by the Harter Act.

Referring to that case Judge Gilbert in *The Indrapura,* 190 Fed. Rep. 714, said:

> "In that case it was held that the Harter Act did not exempt the vessel from liability for injury caused by a latent defect."
>
> *The Jean Bart,* 197 Fed. Rep. 1002.

In this case the negligent failure of the master of the vessel to make proper use of the ventilating apparatus during the course of a five months' voyage, by reason of which, and the presence in the cargo of a large quantity of coke, the wicker or straw coverings on a large number of wine bottles were sweated and ruined, was the ground of complaint. In its opinion the Court said:

> It is contended, however, that under the provisions of the Harter Act * * * the owner is not chargeable with such negligence of the officers of the ship. * * * Section 1 of the Act, however, provides that it shall not be lawful for the master or owner of any vessel to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be released from liability for loss

or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any merchandise or property. The question therefore is whether the failure to properly use the ventilating equipment is a fault or error in navigation or in the management of the ship under the third section; or whether it is negligence, fault, or failure in proper * * * care * * * of merchandise or property * * * I am of the opinion that here the failure of the officers primarily related to the care of the cargo, * * * The general conclusion reached is that the libelant is entitled to recover the damages sustained, with interest and costs.

The R. P. Fitzgerald, 212 Fed. Rep. 678.

In this case exemption from liability was claimed on the ground that the proximate cause of the damage to a cargo of wheat, was carelessness of a seaman who in cleaning an oil tank loosened a seam causing the tank to leak. The Court said that the contention of the claimant that carelessness in cleaning the tank was the proximate cause of the damage, and that, being excused, by the third section of the Harter Act, from its results as a fault or error in management, the libelant cannot recover, has no sanction in the law.

"It will be seen that the question is not one of relative operating causes, proximate or remote. It has to do with the circumstances under which the owner of a vessel is relieved by

the operation of the act from consequences for which he would have been responsible prior to its enactment, and involves his responsibility for the condition of his vessel at the inception of the voyage to carry the cargo which he has contracted to transport."

The opinion quotes the following excerpts from Chief Justice Fuller's opinion in the case of *International Navigation Co. v. Farr,* 181 U. S. 218-226, 21 Sup. Ct. 591, 45 L. Ed. 830.

"Seaworthiness at the commencement of the voyage is a condition precedent, and fault in management is no defense when there is lack of due diligence before the vessel breaks ground. * * * We repeat that, even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

Further on the opinion states:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."

Citing,

The Sylvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241,

The Southwark, 191 U. S. 1-9, 24 Sup. Ct. 1, 48 L. Ed. 65.

" * * * In exercising the degree of care imposed upon the owner by the law *(The Irrawaddy,* 171 U. S. 187, 192; 18 Sup. Ct. 831, 43 L. Ed. 130; *The Tenedos,* 137 Fed. 443, 445), he will be required to take such precautions as are reasonably adequate for the protection of the cargo against known perils, or which reasonable foresight may have anticipated. *(The Jean Bart,* 197 Fed. 1002, 1003, 1004). * * * No doubt if the deck of a vessel were improperly calked and water from cleaning the deck, or from careless handling, or from ordinary perils of the sea, had leaked through to the damage of a load of wheat immediately below, there would be a condition of unseaworthiness. *The Ninfa,* 156 Fed. 512. * * *

The third section of the Harter Act is an act of grace, giving the owner exemption from acts of carelessness in management, such as improper cleaning of the oil can, if only he shows his vessel to have been seaworthy at the inception of the voyage and excuses him from liability to which he otherwise would be subjected for such negligence if, in spite of the negligence and notwithstanding the injury resulting therefrom, his vessel is seaworthy as against such acts, or he has used reasonable diligence to make her so."

In *The Tenedos* 137 Fed. Rep. 446-7, Judge Holt said:

"The fact that ship owners are not in the

habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them. *The Edwin I. Morrison,* 153 U. S. 217, 14 Sup. 823, 38 L. Ed. 688."

IX.

A Bill of Lading, not signed by either the owner, master, or agent of the carrying ship, nor assented to as to its stipulations, is not a contract, but a mere way bill, useful only, as a memorandum of merchandise received for transportation.

Exemption clauses and conditions in a bill of lading, delivered after the carrier has received the goods, are not binding upon the shipper unless expressly assented to by him.

Pacific Coast Co. v. Yukon Independent Transportation Co., 155 Fed. Rep. 37.

X.

The necessary reasonable expense of reconditioning merchandise damaged on ship board is an element of damages for which a maritime lien attaches to the ship.

When the 29,657 cases of salmon arrived at the Virginia Street Dock the libelant had to do something; and what was the common sense thing to do? The whole consignment might have been sacrificed by selling it for whatever trifling amount might have been obtainable for it in its damaged and unmerchantable condition and if that had been done the

libelant's claim against the *Jeannie* would have amounted to, approximately, $85,000.00.

Western Manufacturing Co. v. The Guiding Star, 37 Fed. Rep. 641.

This was a suit *in rem* to recover damages on account of a consignment of butterine which by the carrier's fault was delivered at New Orleans in an unmerchantable condition, and was there sold for fifty per cent of the market value of good butterine. The legal measure of damages in such a case is stated in the syllabus as follows:

> "The difference between the price for which the article was sold and the market value at the place of delivery on its arrival, had it been in good condition, with interest, is the proper measure of damages."

This Court held to that rule in the case of *U. S. S. Co. v. Haskins,* 181 Fed. Rep. 962.

The same rule as to the measure of damages was applied in the case of *The Berengere,* 155 Fed. Rep. 439.

It is the duty, however, of a party whose property has been damaged to minimize the loss as much as possible. And the right thing to do is what all the parties interested agreed should be done in this case, viz., have all the cases of salmon overhauled and restored to merchantable condition. That is what was done at an expense of $4,283.06; the libelant paid that sum for necessary work, and that payment is an element of the damages to be assessed in this case.

"The owner of property being bound to exert himself to prevent damage, and to render the injury as light as possible, where he is so situated in respect to the subject in question as to raise that duty, may recover for his reasonable and necessary labor or expense for that object."

3 Sutherland On Damages, 3rd ed. section 921.

"But it was the duty of libelant to use all proper efforts in reducing the loss as much as practicable. He fulfilled his duty, and saved all but 30,000 feet. This was a great saving to respondent. He should pay not only for the lumber lost, but also all proper expense incurred in saving the remainder."

The Henry Buck, 39 Fed. Rep. 212.

XI.

When by the ship's fault delivery of cargo consisting of goods manufactured for sale, has been delayed, and the market price thereof declines, a right of action sounding in tort accrues to the cargo owner, and the measure of damages for mere detention is the difference between the market value at the date of delivery and at the time when delivery should have been made.

The libelant having paid the freight, was entitled to have the goods delivered in good condition, promptly on arrival of the *Jeannie* at Seattle, when the market value thereof was $85,630.40, but during the time necessary for overhauling and repacking,

a period of seventy days, it was deprived of possession and power of disposing of said goods and at the termination of said period of detention the market value was $77,695.00. Reimbursement for the cash paid out will not compensate for the loss proved; there was expense for storage, and insurance amounting in the aggregate to nearly one thousand dollars. Mere detention of saleable merchandise, having a market value, is an injury to a business man, and an actionable wrong. The law measures the compensation for such wrong by the amount of depreciation in market value during the time of detention.

> "In an action against a carrier of goods for failure to deliver the same within a reasonable time, the measure of damages is the difference in value of the merchandise at the time and place it ought to have been delivered in the usual course of transportation, and at the time of its actual delivery or tender, *whether the difference in value was occasioned by injury to the goods or was due to a decline in the market value,* with interest added, and freight charges, if any unpaid, deducted."
>
> *Moore on Carriers,* 410.

In *The Caledonia,* 43 Fed. Rep. 681-686, Mr. Justice Gray stated the rule in the following words:

> "A common carrier, receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the

same place afterwards, and when their market value is less, is responsible to the owner of the goods for such difference in value."

A decree was rendered in that case according to the rule so stated, and it was affirmed by the Supreme Court in 157 U. S. 124, 39 L. Ed. 644.

The general rule that only compensation for *actual loss sustained* can be recovered is not inconsistent with this *special* rule, because depreciation in market value of goods intended for sale while the owner is wrongfully deprived of possession is, in a legal sense, an actual loss *non-constat* that, he may by holding for a possible subsequent rise in market value sell for a higher price and make a profit thereby.

The Alexander Gibson, 56 Fed. Rep. 603. In that case the ship was charterd to carry a cargo of wheat from Tacoma to Europe; there was a dispute between the ship's master and the charterer with respect to the choice of a stevedore to stow the cargo and consequent delay in loading. The ship was libeled before her departure, by the charterer to recover damages for breach of the charter-party contract; an appeal was taken from the decree rendered by the District Court to the Circuit Court, which then had appellate jurisdiction, and Judge Sawyer rendered a decree in the libelant's favor for the amount of damages computed on a decline of one shilling and six pence per quarter in the market price of wheat during the time of detention; and that decree was affirmed by the Circuit Court of Appeals. There was

no other claim for damages; the only breach of the Charter-party was in delay in loading; the wheat was not impaired in value by any injury to it as a commodity and there was no claim of loss of an opportunity to sell it during the time of the ship's detention at the loading port. The decision is clean cut, holding the carrier liable to the cargo owner for damages in the amount of depreciation in market value during the time of delay in performance of its contract.

The same rule is given in *Desty's Shipping and Admiralty,* section 256, and in the following cases:

Page v. Munro, Fed. Cas. No. 10,665;
The Success, Fed. Cas. No. 13,586;
The Golden Rule, 9 Fed. Rep. 334;
The Giulio, 34 Fed. Rep. 911;
The City of Para, 44 Fed. Rep. 689;
The Berengere, 155 Fed. Rep. 440.

The Appellant, to meet the exigency of its case, has tried to modify that rule, insisting that in such a case no amount of damages can be awarded unless an opportunity for an actual sale has been lost in consequence of the delay; and that if the owner of the merchandise has in stock other goods sufficient to supply the market demand he is precluded from claiming any such loss of an opportunity to make an actual sale of the particular goods.

In practical effect this theory would discriminate thus: Brown, being the owner of a cargo in the custody of a carrier and by being prevented from

consummating a sale thereof by reason of inability to make delivery to a buyer in consequence of the carrier's delay and having no other goods acceptable to his customers would, in case of a decline in market value, have a valid claim for damages against the carrier; whereas Jones, being the owner of a similar cargo and also possessed of other goods sufficient to supply the trade during the time of delay in delivery of his cargo, by the carrier's fault, would, notwithstanding a decline in market value, have no right to recover damages. In Brown's case, his own lack of forehandedness would be the foundation of a valid cause of action; in Jones' case the carrier's culpability would be inconsequential.

Evidence of a contract of actual sale of the salmon and loss of profits which would have accrued to the libelant from consummation of sale, by reason of inability to make delivery to the buyer in consequence of the respondent's fault would be irrelevant in this case because the vessel would have no relation to such a contract. It was so held by Judge Wolverton in the case of *The Berengere,* 155 Fed. Rep. 439-440.

XII.

Interest at the rate of six per cent per annum, on the amount of money necessarily expended in consequence of a maritime tort, from the date of payment thereof, is also an element of damages for which the ship is liable.

Six per cent per annum is the legal rate of in-

terest in the State of Washington and the customary rate in Admiralty causes.

In the case of *The Nith,* 36 Fed. Rep. 86-96, merchandise was so damaged in transit from Liverpool to Portland that when discharged from the ship at the end of the voyage it was unmerchantable. In heavy weather when the ship's deck was flooded, a rent in the main mast coat made an opening through which sea water was precipited into the interior of the ship. In his decision Judge Deady determined that notwithstanding the sea peril the ship was liable for the damage to cargo, because of negligence in bad stowage, and awarded as damages the amount of the market value of the merchandise and interest thereon at the legal rate in Oregon. On appeal to the Circuit Court, Judge Sawyer affirmed the decree (36 Fed. Rep. 383); and that case as an authority for allowance of interest on the amount of damages recoverable for injury to cargo, is cited approvingly in the opinion of this Court in the case of *Steamship Wellesley Co. v. C. A. Hooper & Co.,* 185 Fed. Rep. 733-740, in which the Court said:

> "We find no merit in the contention that the Court made an error in calculating the number of shingles lost or in awarding damages at 7 per cent per annum compounded at the date of the decree. Seven per cent was allowed as the legal rate of interest fixed by the law of California. * * * Nor was it error to award interest on the whole of the decree from the date thereof."

This Court has disapproved allowances of interest on damages for personal injuries; and, in the case of *The Rickmers,* 142 Fed. Rep. 314, has held that in cases of damage to property, interest may be allowed or refused in the exercise of judicial discretion. Having that decision in mind, we appealed to the discretion of the District Court, in submitting this case on final hearing, to allow interest at the legal rate on the amount of money paid by the Libelant for restoring the goods to merchantable condition; and interest on that amount from the date of the payment to the date the decree was allowed.

We respectfully submit that the decree is right and pray for affirmance thereof.

C. H. HANFORD,
KERR & McCORD,
Proctors for Appellee.

ANSWERING APPELLANT'S BRIEF.

A laborious argument, to prove that the Jeannie was seaworthy, concludes, on page 40 of the appellant's brief, in a plea for limitation of the damages to be awarded. The last sentence reads as follows:

> "The only evidence in the case as to the amount of damage from each cause is the estimate of Mr. West that about 15 per cent was coal dust damage, and the award would have to be made on this basis."

Fifteen per cent of what?

The value of the cargo was $85,630.40. Fifteen per cent of that total, exceeds the amount which the decree awards.

That plea, whatever other meaning may have been intended, amounts to an admission of failure in the attempt to prove that the Jeannie was seaworthy; and the authorities cited and the evidence reviewed lead with unerring directness to that conclusion.

The testimony of West proves that the cargo was damaged, as it could not have been in a seaworthy ship.

The testimony of Gunther proves that the libelant's goods were damaged by coal dust, by seawater and by bilge water. He gave as the only explanation for the wetting of cases next to the walls of the ship's hold that bilge water must have been spurted through cracks and seams in the skin of the ship.

The other witnesses had no knowledge, by personal inspection of the condition of the ship, with respect to her fitness for carriage of the cargo. Capt. Karbbe

did not see how the cargo was stowed or protected; he did not go down into the ship's hold at any time during the voyage. He told Mr. Roberts that he asked for new tarpaulins needed for hatch covers and that they were not furnished. This was not denied by him nor by Manager Swan.

The mere supposition that seawater entered through an anchor locker and through a seam in the deck next to a hatch coaming will not exculpate the ship. It matters not whether water gained entrance because of rotten hatch covers, or general infirmity; nor will the court conjecture that the leakages commented on in appellant's brief were caused by straining when the ship was rolling in tempestuous weather. The planks next to the keelson are the firmest in the floor of a ship; next to her bulwarks and hatch coamings are the strongest parts of her deck; and an anchor locker is about the last place in a ship to be affected by strain when the ship is rolling.

Ships are designed to roll and plunge in billowing seas, and the notion that the Jeannie was so good a ship that she could, with six hundred tons of freight on board, enter a narrow rocky channel, choose a soft place there, sink into mud to a depth of four feet and rest there until a flood tide released her without being injured in any way to affect her seaworthiness; and that the same ship on the same voyage was so tender that just rolling in deep water strained her and made leakages, will not take with any one who has had experience in maritime litigation.

Just a little coal dust in a wet ship will not permeate a well stowed cargo; nor will the spurting of bilge water wet a cargo when there is sufficient space and dunnage between it and the skin of the ship.

All this excludes every hypothesis except that the Jeannie was not clean, nor water tight and her cargo was not properly stowed, dunnaged, and protected. Mr. Gunther's testimony to the contrary is unbelievable.

HORNER'S BILL.

In the brief the bill which the libelant paid for overhauling and reconditioning the cargo, is pecked at. It is said that there was short delivery to the extent of thirteen cases and the bill includes a charge of six cents per case for opening, examining and repacking that number of cases in excess of the number actually so treated; that a charge was made for opening and repacking all the cases although only 4,088 were found to be damaged; that there are some errors in the computation of the number of cans relacquered and relabelled and the bill includes the cost of new labels and materials in excess of the quantity actually used; and finally that the libelant was benefitted by the overhauling and repacking of the goods for which a set-off is claimed.

There is, in the record, no contradiction of Mr. Horner's testimony that the bill is for no more than the just cost of the service he rendered; the libelant regarded it as just and paid it in full instead of higgle-haggling for trifling reductions, for the bene-

fit of whomsoever should ultimately have to bear the loss. The Jeannie received for transportation 29,657 cases and freight money for that number. Now if thirteen of those cases were never delivered, the appellant should pay or tender the value thereof befor complaining to this court about an excess charge in Horner's bill of 78 cents. *De minimis non curat lex.*

It was not an extraordinary thing, nor imprudent for Mr. Horner to procure in advance a supply of labels and box materials on an estimate of the necessary quantities and if he had been obliged to sue either of the parties to this suit to collect his bill it is not probable that a defense *pro tanto* for the value of labels or materials left on his hands would have prevailed.

EVIDENCE AS TO MARKET VALUE.

The appellant's argument, assuming that there is lack of evidence to prove the market value of libelant's goods, is hypercritical. It is said that none of the witnesses knew anything about market value; this notwithstanding quotations of testimony showing conclusively that the witnesses had to know and did know all about the market fluctuations at Seattle, that being the place where they carry on their business in selling and shipping Alaska salmon to supply the trade.

It is said that the evidence had reference only to the per case value and does not prove the market value of stocks in bulk and further that only the

values of grades and brands of libelant's goods were inquired about and nothing said as to the particular value of the specific goods comprised in the Jeannie cargo. The comment on the Supreme Court decision in the Caledonia case on page 107 of the brief is that, the Court applied the rule of loss of market price because "it is found as a fact that these parties knew and contemplated that the cattle were not to be sold before arrival, but were to be sold at the first possible market day after arrival." The inuendo being that in this case the Jeannie people might have innocently supposed that the Burckhart brothers were operating three canneries in Alaska merely to catch and can enough salmon for their own eating.

Now the whole of this argument is well refuted in Judge Neterer's memorandum decision and there is no substantial reason for reversal of his findings as to market value. The goods were shipped in due course of an established business to meet the demands of trade, that is, to be sold in such lots as purchasers might require. It was so understood because the Jeannie had been carrying other consignments of canned salmon from the libelant's canneries to Seattle. Testimony of Swan, Record, p. 320.

5500 CASES OF CHUMS.

A claim is made that, although the market price of certain brands of canned salmon of the grade known to the trade as "chums" declined while the Jeannie cargo was being overhauled, part of said cargo, to-wit: 5500 cases of chums were actually sold and

shipped previous to the slump in price; and that a deduction of $1,650.00 from the award should be made for that reason.

This is an after thought; no such contention was made in the District Court, at, before, or after the final hearing; and the point is not suggested in the assignment of errors.

For that reason the whole argument in support of this claim violates this court's eleventh rule; and we refrain from offering any reply.

We deny the claim, however, and will give reasons, orally, at the hearing, if requested by the Court to do so, as the rule provides.

C. H. Hanford,
Kerr & McCord,
Proctors for Appellee.